IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 223

TENNESSEE GAS TRANSMISSION COMPANY, *Appellant*,

v.

MISSISSIPPI STATE TAX COMMISSION, *Appellee*.

Appeal from the Supreme Court of the State of Mississippi

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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Appellant contends, for reasons presented in its "Statement As To Jurisdiction" and for those assigned in the following brief, that this cause presents substantial Federal questions that are so substantial as to require the submission of briefs and oral argument on the merits before this Court.

Appellee's Motion To Dismiss should therefore be denied.

I.

STATEMENT OF THE CASE

Appellant has no objection to the statement of the case set forth in Appellee's Motion To Dismiss except insofar as allegations contained in the appendix thereto are treated by Appellee as established facts. This material was attached to a pleading which required no responsive pleading (R-39) and therefore was never admitted by Appellant. These allegations were never proved either by way of stipulation (R-41) or by evidence introduced at the time of trial (R-49)

II.

ARGUMENT

The principal argument advanced by Appellee in its Motion to Dismiss is set forth as follows (p. 6):

> Appellant concedes that it is subject to the Mississippi franchise tax and that the amount of capital employed in the state may be determined by use of the factors of real and tangible personal property owned or used in Mississippi; gross receipts from business carried on in Mississippi, total real and tangible personal property wherever located, and gross receipts from wherever received.
>
> Appellant disputes only the validity of the method of determination of the factor of "gross receipts from business carried on in Mississippi," which is required by the 1956 legislative enactment for those organizations using a formula method of apportionment in making income tax returns. (Jurisdictional Statement, page 12).
>
> The ultimate question for decision is not necessarily whether the State of Mississippi is taxing more than its share of Appellant's capital but

whether appellant has proved that it has done so. The presumption is to the contrary. This burden is on the appellant, who has possession of all of its books and records, and not on the appellee who has none of these.

There is nothing novel about this question. The law has been stated by this Court many times, the leading cases being *Hans Rees' Sons, Inc.* v. *North Carolina, ex rel Maxwell*, 283 U.S. 123 and *Butler Bros.* v. *McColgan* (sic), 315 U.S. 501, 507. Appellant having failed to make its proof should fail in the maintenance of its case.

Appellee obviously misses the thrust of Appellant's attack on the Mississippi franchise tax apportionment formula, misconstrues the nature of Appellant's burden in attacking such formula, and fails to appreciate the basic nature of a fair or reasonable apportionment formula.

1.

The Revised Mississippi Franchise Tax Apportionment Formula Results in the Taxation of Extraterritorial Capital

In *Memphis Natural Gas Company* v. *Stone*, 335 U.S. 80 (1948), this Court passed upon the validity of the Mississippi franchise tax as imposed on foreign corporations prior to the amendment by the Mississippi State Legislature in 1956 of Section 9319, Mississippi Code of 1942, Recompiled. It is precisely this amendment, and the constitutionality of the statute as amended, that forms the basis of this appeal. Although the tax itself was challenged, the apportionment formula in its earlier form was not under attack in the *Memphis* case.

Prior to the 1956 amendment, the Mississippi franchise tax apportionment formula used actual Missis-

sippi figures in arriving at the amount of Mississippi property and gross receipts from business carried on in that state. The 1956 amendment complained of required the substitution, for actual gross receipts from business carried on in Mississippi, of a figure arrived at through the use of another apportionment formula designed to compute net income for purposes of the Mississippi net income tax. The effect of this substitution in Appellant's case for the year 1956 was to increase the Mississippi gross receipts factor in the formula from $1,397,333 to $11,204,833, thus adding to the numerator of the formula the amount of $9,807,500 of extraterritorial gross receipts. The amount of extraterritorial gross receipts added was more than eight times the amount of actual Mississippi gross receipts and comprised 88 per cent of the apportioned gross receipts required to be used in the formula under the 1956 amendment. This resulted in the Mississippi franchise tax being applied to $2,343,538 of non-Mississippi capital.

2.

Appellant May Challenge the Mississippi State Franchise Tax Apportionment Formula as Being Invalid on Its Face

This Court has clearly implied, if not expressly held, that an apportionment formula may be invalid on its face, *Norfolk and Western R. Co.* v. *No. Carolina*, 297 U.S. 682 (1936). The Court also recognized that even though valid on its face, an apportionment formula can be unworkable or unfair when applied to a particular taxpayer in particular conditions.

The test set forth by this Court in *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942) citing the *Bass* and

Ford Motor Company cases[1] is whether the statutory formula of allocation is "fairly calculated" to assign to the taxing state that portion of the net income or capital "reasonably attributable" to the business done there. A statutory formula which does not meet this test is invalid on its face. Obviously then it is only when the apportionment formula is not invalid on its face that proof by clear and cogent evidence of the taxation of extraterritorial values is required for the demonstration of its invalidity.

Each of the cases cited by Appellee in support of its argument that Appellant has not met the burden of showing the unconstitutional taxation of extraterritorial values involves the question of whether an apportionment formula not invalid on its face is unconstitutional in its application to the specific facts in that case. It is in situations involving the application of an apparently valid formula that this Court has required "clear and cogent" evidence of the taxation of extraterritorial values and has not held the states to mathematical exactitude. Appellant submits that the burden of showing that an apportionment is invalid on its face is quite different from the burden required where the attack is leveled on an apparently valid formula.

This case is novel in that it clearly raises the question of whether an apportionment formula may be considered unconstitutional as invalid on its face. Certainly this is a question which should be fully considered and definitely determined by this Court.

[1] *Bass, Ratcliff and Gretton Ltd. v. State Tax Commission*, 266 U.S. 271 (1924); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939).

3.

The Revised Mississippi Franchise Tax Apportionment Formula Is Invalid on Its Face

In holding that the Mississippi franchise tax levied under the old form of apportionment formula was not discriminatory, this Court in the *Memphis* case, *supra*, observed (p. 88):

> . . . A glance at the activities, named above, listed by the Supreme Court of Mississippi, shows that there is no possibility of multiple taxation through the same exaction by other states. The amount of tax is reasonable. It is properly apportioned to the investment in Mississippi.

It follows that if the tax is not "properly apportioned to the investment in Mississippi" then the tax is applied to the investment in other states and there is a "possibility of multiple taxation through the same exaction by other states." Appellant submits that a franchise tax can be duplicated in other states unless each of the taxing states is required to use factors having a direct relation to the taxing state in framing its apportionment formula. If the factors in the formula contain extraterritorial elements, its use can and will result in the application of the tax to the investment in other states and, therefore, render the formula invalid on its face.

Appellant contends that the Mississippi franchise tax apportionment formula is invalid on its face because it departs from the fundamental principle of a fair and reasonable apportionment formula in that the "Mississippi Gross Receipts" factor in the numerator of the formula is not limited to items having actual or direct connection with Mississippi but, rather, is derived largely from extraterritorial values. In the plethora of cases considered by this Court, wherein ap-

portionment formulas used by states in imposing franchise taxes on foreign corporations have been upheld, one common pattern has emerged. In all of these cases the business elements such as property or gross receipts, which comprised the various factors of the apportionment formula bore a direct relation to and had a clear nexus to the taxing state. In this case the elements required by the statute to be included in the "Mississippi Gross Receipts" factor of the formula bear no such logical or discernable relationship to that State but, rather, are rightfully attributable to business in other states. The presence of these extraterritorial values in the numerator of the formula affects its basic fairness and applies the tax to extraterritorial capital.

Not only is the franchise tax formula invalid on its face, as shown above, it is clearly invalid in its application as will be demonstrated below. As previously indicated, the 1956 amendment changed the Mississippi franchise tax formula by substituting for actual Mississippi gross receipts an apportioned gross receipts figure which is more than eight times as great as actual gross receipts. This is accomplished by taking the Mississippi net income tax apportionment formula and applying the percentage thus obtained to unitary gross receipts of Appellant. The $9,807,500 of gross receipts thus required to be added to the numerator of the formula are extraterritorial gross receipts. The $2,343,538 of capital required to be added to the tax base is extraterritorial capital.

Even assuming that the Mississippi income tax formula is valid, this still does not mean that its application to total unitary receipts produces a proper measure of Mississippi gross receipts as a factor to be used in the franchise tax apportionment formula.

The Mississippi income tax formula, like the franchise tax formulas previously upheld by this Court, contains only factors having actual connection with Mississippi. As indicated above, its use may arrive at a fair result in apportioning net income to Mississippi for income tax purposes, but it does not follow that it may be used to apportion extraterritorial gross receipts to Mississippi as a part of the franchise tax formula since this gives extraterritorial values great weight in the latter formula and results in the application of the tax to extraterritorial capital.

III.

CONCLUSION

For the reasons discussed in Appellant's "Statement as to Jurisdiction" and for those stated herein, it is urged that Appellee's Motion to Dismiss should be denied and that the Court should give plenary consideration to the case and permit the filing of briefs and oral argument on the merits.

Respectfully submitted,

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